

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:

CIVIL ACTION: 01-CV-12257-PBS

TRACK TWO SETTLEMENT

Judge Patti B. Saris

**PLAINTIFFS' REONSE TO THE KLINE & SPECTER GROUP'S
DKT. NO. 7975 FILING**

Even though they do not represent any clients relating to the Track Two Settlement, on December 7, 2011, the four law firms of Kline & Specter, P.C., the Williams Law Firm, the Law Office of Adam Levy and Jennings Haug & Cunningham, LLP (the "K&S Group") filed a Response to Proposed Final Order and Judgment Granting Final Approval to Proposed Track Two Class Action Settlements, Approving Proposed Allocation of Settlement Funds, and Approving Class Counsel's Application for Attorneys' Fees, Reimbursement of Litigation Expenses and Compensation for Class Representatives (Dkt. No. 7975, the "K&S Group Response"). The K&S Group Response objects to the following sentence contained in the Proposed Final Approval Order: "The attorneys' fees and expenses awarded by the Court shall be allocated among Class Counsel by Lead Class Counsel at their discretion." *See* Proposed Order at 13. The sole reason for the objection is that the K&S Group has a motion pending asking the Court to pay it for time and expenses incurred in non-MDL cases that did not benefit the MDL.

The Court should deny the objection. First, as should be obvious, the K&S Group motion is already pending, and the Court will consider it in due course and, presumably, issue a ruling. Thus, there is no risk that the K&S Group demand, however unsupported, will go unaddressed by the Court. And, as contemplated by the Court and discussed at the last hearing, if the Track Two Settlement receives final approval and achieves finality, and if this dispute remains unresolved by that time, Lead Class Counsel can simply escrow the disputed amount of fees until final resolution of the issue.

Second, the K&S Group should not be permitted to otherwise interfere with Lead Class Counsel's ability to allocate attorneys' fees, *as this Court has already expressly authorized*. A similar provision authorizing Lead Class Counsel to allocate attorneys' fees was included in *all* prior approval orders. *See* Dkt. No. 7674 at 9 (BMS Settlement) ("The attorneys' fees and expenses awarded by the Court shall be allocated among present and former Class Counsel by Lead Class Counsel at their discretion."); Dkt. No. 7432 at 9 and Dkt. No. 7433 at 9-10 (AstraZeneca National Settlements) ("The attorneys' fees and expenses awarded by the Court shall be allocated among Class Counsel by Lead Class Counsel pursuant to the Agreement and shall, upon petition, be reviewed on an abuse of discretion standard."); Dkt. No. 5802 at 7 (AstraZeneca Class 1 Settlement) ("The attorneys' fees and expenses awarded by the Court shall be allocated among Class Counsel by Lead Class Counsel at their discretion subject to review by the Court if there is an objection. Class counsel shall file in Court an explanation of the methods of allocating the attorneys' fees and expenses among the firms."); Dkt. No. 4619 at 9 (GSK Settlement) ("Co-Lead Settlement Class Counsel shall allocate fees to themselves and other Plaintiffs Class Counsel in their sole discretion as appropriate."). And the Court has also made clear that it will review any objections to Lead Class Counsel fee allocations on an abuse of

discretion standard. *See* Dec. 10, 2008 Electronic Order. There is no reason to break with the prior practice, specifically and repeatedly authorized by the Court, of having Lead Class Counsel make their fee allocations subject to the Court's review for abuse of discretion if a firm objects to their allocation.

In any event, the K&S Group Response does not relate to the merits of the Track Two Settlement and should not in any way delay the Court's entry of an order granting final approval of the Track Two Settlement.

DATED: December 8, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, **PLAINTIFFS' REPONSE TO THE KLINE & SPECTER GROUP'S DKT. NO. 7975 FILING**, to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on December 8, 2011, a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ Steve W. Berman

Steve W. Berman